FILED
FEB 1 1995
OFFICE OF THE CLERK

No. 94-1079

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION AND
BASF CORPORATION,
Petitioners,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONERS

PETER BUSCEMI *
HOWARD T. WEIR
THOMAS J. O'BRIEN
ELLEN B. STEEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Petitioners
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES

	Page
Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100 (N.D. Ill. 1988)	5
Am. Cyanamid Co. v. King Indus., Inc., 814 F. Supp. 215 (D.R.I. 1993)	7
Barton Solvents, Inc. v. Southwest Petro-Chem., Inc., 834 F. Supp. 342 (D. Kan. 1993)	7
Barton Solvents, Inc. v. Southwest Petro-Chem., Inc., 38 E.R.C. 1022 (D. Kan. 1993)	5
Charter Township of Oshtemo v. Am. Cyanamid Co., No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176 (W.D. Mich. Aug. 19, 1993)	5
Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994)	2, 5, 6
Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)	4
United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990)	7
United States v. Pretty Prod., Inc., 780 F. Supp. 1488 (S.D. Ohio 1991)	7
United States v. SCA Serv. of Indiana, Inc., 849 F. Supp. 1264 (N.D. Ill. 1994)	5, 7
United States v. SCA Serv. of Indiana, Inc., 865 F. Supp. 533 (N.D. Ill. 1994)	8
Velsicol Chem. Corp. v. Enenco, Inc., 9 F.3d 524 (6th Cir. 1993)	4

STATUTES

42 U.S.C. § 9606	3
42 U.S.C. § 9607(a)	*passim*
42 U.S.C. § 9613(f)	*passim*
42 U.S.C. § 9613(f)(3)(B)	4, 5
42 U.S.C. § 9613(g)(2)	3, 4, 6
42 U.S.C. § 9613(g)(3)	*passim*
42 U.S.C. § 9622(g)	6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1079

UNITED TECHNOLOGIES CORPORATION AND
BASF CORPORATION,
Petitioners,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONERS

---

1. Respondents' briefs in opposition fail to come to grips with the central issue decided by the court of appeals. Instead, respondents attempt to divert attention from that issue, and from the reasons warranting review, by focusing entirely on whether or not petitioners' action is properly characterized as one for contribution. But that question is not dispositive, is not the basis for the court of appeals' decision, and is quite different from either of the questions for which review is sought in the petition.

The court of appeals held that petitioners have no right of action under CERCLA Section 107(a) because, as PRPs who settled with the government, their sole remedy under CERCLA is an action for contribution under Sec-

tion 113(f). This holding is the linchpin of the court of appeals' decision. The court did not decide, as respondents would have it, that, even if petitioners could proceed under Section 107(a), they would still be bound by the three-year limitations period in Section 113(g)(3). Such a holding would be incorrect, and independently might warrant review here, but it is not the holding of the court of appeals. Rather, the court below resolved this case on a much more fundamental basis, namely, that PRPs are simply not entitled to proceed under Section 107(a). Pet. App. 15a-16a and n.12.

This holding is in direct conflict with the decision of this Court in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), and likewise is at odds with decisions in other circuits, which have granted Section 107(a) relief to PRPs under similar circumstances. Pet. 16-18. Respondents simply refuse to address *this* conflict, arguing instead that there is no conflict on the question that *they* prefer to discuss, namely, the different issue of whether petitioners' action should be classified as an action for contribution. Respondents' extended dissertation on that point cannot detract from the importance of the question actually decided by the court of appeals and cannot hide or eliminate the conflict in the interpretation of Section 107(a) that this Court should resolve.

2. At stake in this case are the rights of numerous PRPs that have entered settlements and many more PRPs that must evaluate whether settlement is a feasible option for them in light of the rule announced by the court of appeals. Respondents do not dispute the far-reaching implications of the decision below. Rather, they urge the Court to disregard the actual ruling of the court of appeals, and to focus instead on whether petitioners' claim is one for contribution, without regard for the statutory source of petitioners' rights.

Putting aside the fact that the position urged by respondents is not the one adopted by the court of appeals,

respondents' argument fails to address petitioners' point that the six-year limitations period of Section 113(g)(2) expressly applies to actions under Section 107(a), whether or not those actions are described as claims for contribution. Pet. 20-21. Not only do respondents fail to deal with the express language of Section 113(g)(2), but they also fail to explain how petitioners' claim in this action, even if labeled "contribution," falls within the language of Section 113(g)(3).

Respondents attempt to convey the impression that Section 113(g)(3) covers all CERCLA contribution actions, ignoring the rather obvious fact that the express language of the statute cannot support such a broad construction. For example, as the petition explains (Pet. 22), "contribution" claims for response costs incurred by PRPs that do not settle but are the subjects of mandatory Section 106 cleanup orders plainly do not fit under any of the proceedings enumerated in Section 113(g)(3), and Section 113(g)(3) therefore cannot provide the limitations period for such claims.[1]

Respondents attempt to derive support from the introductory text of Section 113(g)(3), which refers to "any" response costs being sought in a CERCLA contribution

---

[1] PRPs that receive Section 106 administrative orders illustrate the flaws in the court of appeals' decision in another way as well. PRPs that abide by such orders and conduct cleanups have not entered into any administrative or judicially approved settlement with the United States, nor have they been parties to any civil action under Section 106 or Section 107(a). Accordingly, if such PRPs wish to assert a claim to recover an appropriate share of their response costs from other PRPs, they will be unable to assert any cause of action under Section 113(f) because they will not fit within any of the categories of actions authorized in that provision. Their sole recourse will be an action to recover response costs under Section 107(a). Under the court of appeals' decision in this case, however, such an action would be barred because of the claimant's status as a "non-innocent" PRP. Nothing in CERCLA or SARA suggests that Congress intended to impose such harsh consequences on a party that complies with a Section 106 order.

action. BFI Br. in Op. 10. But this treats as insignificant the remaining language of the provision, which expressly limits the kinds of contribution actions covered by the section. With regard to an action for contribution for response costs covered by "a judicially approved settlement," the statute says that the three-year period applies only "with respect to such [response] costs" set forth in the settlement. The only response costs in this case covered by that language are the $475,000 in payments to the government, which are not at issue here. The response costs petitioners seek here were not liquidated in the settlement but stem from an agreement to clean up the site. The only costs that the consent decree expressly required petitioners to pay were the costs that the federal and state government already had incurred. Beyond those costs, the decree did not obligate petitioners to pay or incur any specified amount of response costs, and it therefore cannot be said that the settlement was "with respect to" the costs that petitioners themselves later incurred.[2]

3. Significantly, respondents make no attempt to defend the court of appeals' determination that cost recovery actions under Section 107(a) and contribution actions under Section 113(f) "are distinct, non-overlapping anodynes" (Pet. App. 16a) and that PRPs may pursue the latter but not the former. Respondents instead cite extensively to Section 113(f)(3)(B), which provides that

---

[2] Respondents' reliance on *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), is misplaced for several reasons. BFI Br. in Opp. 9 n.8. First, *Smith Land*, unlike this case, was a straightforward contribution action and did not involve a claim under Section 107(a) or a dispute about the availability of such a claim. Moreover, that case did not apply any statute of limitations, but simply acknowledged that Section 113(g) provided a potential defense in a contribution action. Finally, the only court of appeals, other than the First Circuit in this case, that has actually *applied* a statute of limitations to a PRP's action for response costs under Section 107(a) applied Section 113(g)(2). *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 529-30 (6th Cir. 1993).

a "person who has resolved its liability to the United States . . . *may* seek contribution" from non-settling PRPs. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). BFI Br. in Opp. 3, 4, 8, 11-12. This section, added in SARA, does not help respondents. By using the word "may," Congress intended to confer a right of action, but nowhere did Congress say or intimate that PRPs may not proceed under Section 107(a) or that Section 113(f) provides the exclusive remedy for a settling PRP. *Charter Township of Oshtemo v. Am. Cyanamid Co.*, No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176, at *4 (W.D. Mich. Aug. 19, 1993); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988).

The legislative history of the 1986 amendments to CERCLA cited by respondents shows that Congress intended to *broaden* rights available to private parties to encourage settlements and private-party cleanups. BFI Br. in Opp. 9. When it enacted those amendments, Congress made clear that the right of action granted under Section 107(a) would remain available "[n]otwithstanding any other provision or rule of law . . . ." Respondents cite no authority for the proposition that, by enacting Section 113(f), Congress intended to cut back on rights that CERCLA otherwise extends to PRPs. To the contrary, *Key Tronic* recognizes that Congress had no such intention when it enacted SARA. 114 S. Ct. at 1966.[3]

---

[3] Respondents take comfort in observing that no pre-SARA court granted a PRP's claim for recovery of response costs under Section 107(a). BFI Br. in Opp. 9 n.7. That is hardly remarkable, given that no court was asked to decide the issue under facts similar to those presented here. Following enactment of SARA, however, several courts have addressed the issue and have decided that a settling PRP is entitled to recover response costs in an action under Section 107. *See, e.g., United States v. SCA Serv. of Indiana, Inc.*, 849 F. Supp. 1264, 1283 (N.D. Ill. 1994); *Barton Solvents, Inc. v. Southwest Petro-Chem., Inc.*, 38 E.R.C. 1022, 1027 (D. Kan. 1993); *Charter Township of Oshtemo v. Am. Cyanamid Co., et al.*, No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176 (W.D. Mich. Aug. 19, 1993).

In a vain attempt to distinguish the relevant facts of this case from the situation considered in *Key Tronic*, respondents observe that the petitioner there incurred response costs *before* it settled with the government. BFI Br. in Opp. 13 n.13. That factual difference is without legal significance. Nothing in *Key Tronic* remotely suggests that the existence of a right of action under Section 107(a) turns on whether response costs are incurred before or after a settlement is concluded.

4. Respondents contend that the contribution protection provided by CERCLA Sections 113(f)(2) and 122(g) would be threatened if petitioners' claims were characterized as anything other than "contribution." BFI Br. in Opp. 15-16. This argument is a red herring, for several reasons.

First, of course, contribution protection has never been at issue in *this* case; none of the respondents has entered a settlement, and therefore none of the respondents can claim any entitlement to contribution protection. It was Inmont (which had been acquired by petitioner UTC and was later sold to petitioner BASF) that settled with the government, not any of the respondents.

Second, as demonstrated above and in the petition, labelling petitioners' action an action for contribution is by no means fatal to petitioners' position. Section 113(g)(3), by its very terms, applies only to those contribution actions specifically enumerated in the statute, and petitioners' claim to recover their response costs does not fall within any of the enumerated categories. Thus, if, as respondents contend, actions like petitioners' must be classified as actions for contribution so as to protect previously settling parties, the actions can be so classified, the statutory protection can be preserved, and petitioners' claim still would not be covered by the three-year limitations period in Section 113(g)(3). Respondents do not suggest that settlement protection would be impaired in any way merely by application of the six-year limitations period in Seciton 113(g)(2).

Third, if petitioners are correct in their alternative contention that their Section 107(a) claim for response costs is not properly characterized as a contribution action at all (and that therefore the three-year limitations period of Section 113(g)(3) never even comes into play) (*see* Pet. 22-24), it simply does not follow that settling parties would have no protection against Section 107(a) cost recovery claims by other PRPs. Courts that have been asked to protect settling parties from claims that clearly do not qualify as claims for contribution under Section 113(f) but that could lead to similar kinds of recovery (*e.g.*, claims of indemnity, quantum meruit, or unjust enrichment) have readily concluded that the statutory protection should extend to such claims. *E.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) (providing settlement protection for state indemnity claims not covered under CERCLA); *United States v. Pretty Prod., Inc.*, 780 F. Supp. 1488, 1495-97 (S.D. Ohio 1991). Nothing in Section 113(f)(2) or Section 122(g)(5) is to the contrary. Because of the strong federal interest in promoting settlements, courts have even extended protection to parties that have entered into private settlements, which are not covered at all under CERCLA Sections 113(f)(2) or 122(g). *E.g., Barton Solvents, Inc. v. Southwest Petro-Chem., Inc.*, 834 F. Supp. 342, 346 (D. Kan. 1993); *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 218 (D.R.I. 1993).

Finally, respondents' attempt to use contribution protection, which was designed to encourage settlements with the government, as a shield to enable them to avoid claims by parties that actually *did* settle with the government puts a perverse twist on the statute's objectives. Indeed, this very argument was rejected by the only other court to decide the statute of limitations issue presented in this case. *United States v. SCA Serv. of Indiana, Inc.*, 849 F. Supp. 1264, 1284 (N.D. Ind. 1994) (applying six-year limitations period to settling PRPs' claims to recover response costs).

5. Two final points warrant brief comment.[4] First, respondents repeatedly portray petitioners as "liable parties" who discharged a "common liability" shared jointly by petitioners and respondents. *E.g.*, BFI Br. in Opp. i, 3, 8, 11, 13, 14 n.15. They do not dispute, however, that petitioners have not admitted liability and, in particular, did not admit liability prior to entry of the consent decree. Pet. 3, 8. Respondents' failure to contest this point highlights the error in the court of appeals' opinion. Defining contribution as "a claim 'by and between jointly and severally liable parties' " (Pet. App. 6a), the court of appeals, laboring under the mistaken belief that "appellants are by their own admission liable parties," concluded that petitioners' claim "must be classified as an action for contribution." Pet. App. 10a. Review is warranted to eliminate the confusion that the court's error will spawn in the development of CERCLA case law. *E.g., United States v. SCA Serv. of Indiana, Inc.*, 865 F. Supp. 533, 545 (N.D. Ill. 1994) (distinguishing the holding in this case on the basis of alleged admission of liability).

Finally, respondents suggest that the legislative process is unlikely to address the issues presented by this case. BFI Br. in Opp. 10-11 n.9; CWM Br. in Opp. 7. They do not dispute petitioners' point that the changes to the limitations provisions proposed in the last Congress were designed to achieve the original intent of SARA. Moreover, respondents' argument only strengthens the reasons for reviewing the decision below. With numerous PRPs attempting to determine what their rights would be under CERCLA if they were to agree to clean up contaminated sites, review by this Court would ensure that CERCLA's

---

[4] The brief in opposition of respondent Carleton Woolen Mills, Inc. ("CWM") merits little discussion, except to say that the assertions made by CWM have no bearing on the questions presented by the petition. CWM's submission appears to be concerned with questions surrounding the allocation of response costs or the recoverability of specific costs, neither of which is at issue here.

goals are fulfilled and give much-needed guidance on the statute's remedies and limitations provisions.

For these reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER BUSCEMI *
HOWARD T. WEIR
THOMAS J. O'BRIEN
ELLEN B. STEEN
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Petitioners

February 1, 1995

* Counsel of Record